IN THE SUPREME COURT OF FLORIDA

CASE NO: SC04-1825
Lower Tribunal No.: 4D03-3268

MCKENZIE CHECK ADVANCE OF FLORIDA, LLC
d/b/a/ NATIONAL CASH ADVANCE,
STEVE A. MCKENZIE and BRENDA G. MCKENZIE,

Petitioners,

v.

WENDY BETTS,
on behalf of herself and those similarly situated,

Respondent.

RESPONDENT'S ANSWER BRIEF

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioners (Defendants below) will be collectively referred to by the name under which they conduct business, "National Cash Advance" or "NCA." Former Plaintiff Donna Reuter was ordered to arbitrate her claims and her appeal of that order was denied by the Fourth District. Reuter v. McKenzie Cash Advance of Florida, 825 So.2d 1070 (Fla. 4th DCA 2002). Reuter appealed that opinion to this Court (Case No. SC-02-2192), and this Court stayed that appeal pending disposition of Cardegna v. Buckeye Check Cashing, Inc., Case No. SC02-2161, in an order dated March 10, 2003. The Cardegna appeal concerns the enforceability of an arbitration provision contained in a deferred presentment payday loan agreement. The legality of deferred presentment agreements prior to the enactment of the Deferred Presentment Act is the issue in this appeal.

STATEMENT OF THE CASE AND FACTS

The Transactions Between Mrs. Betts and NCA

As set forth in NCA's statement of the case and facts, Mrs. Betts engaged in different types of transactions with NCA. In her initial transaction with NCA Mrs. Betts received $200 in cash in exchange for providing two checks in the amount of $115 each to NCA. Mrs. Betts "bought back," or "redeemed," these checks 8 days later by paying NCA $230 in cash. (Resp. Br. at 2-3) Although

this type of transaction is commonly referred to as "deferred presentment" or "deferred deposit," these really are misnomers because a check that is redeemed is never presented for payment or deposited.

A week later Mrs. Betts provided NCA with three checks of $115 each in exchange for $300. (Resp. Br. at 3) Two weeks later she replaced the three checks with three new checks and paid NCA $45 in cash. Id. Two weeks after that Mrs. Betts replaced the three checks with a single check for $338 and again paid NCA in cash. Id. Over the next three months Mrs. Betts then, every two weeks, replaced her check with a new check written for the same face amount. Each time Mrs. Betts provided a new check on these occasions she also paid NCA $38 in cash. Id.

These types of transactions are known in the payday loan business as "rollovers." Some refer to these "replace the check and pay a fee in cash" rollovers as Type II rollovers to distinguish them from transactions where the customer pays a "fee" in cash and the lender agrees to hold the original check for an additional two weeks, which are known as Type I rollovers.

NCA did not provide any cash to Mrs. Betts in these Type II rollover transactions.

Beginning in 1998 NCA required an extra step in the process. Instead of replacing her existing check and paying a "fee" in cash, Mrs. Betts was required to redeem her checks by paying the full face amount of the check in cash. (Resp. Br. at 3) She would then immediately write a new check to NCA and receive back cash, less the 10% "fee."[1] Although these transactions involved the extra step of Mrs. Betts "buying back" her check rather than simply replacing it with a new check, the net effect of these transactions was no different from the previous transactions: Mrs. Betts would leave the store having paid "fees" of 10% of the face amount of the check in exchange for an additional two weeks to pay NCA the full face amount of the check. These transactions, where a check is redeemed for cash and an immediate, consecutive transaction takes place with a new check, are referred to as Type III rollovers.

Betts continued in this pattern–engaging in Type III rollovers about every two weeks–until February 1999. Ultimately, Betts could not afford to pay the fee to extend or rollover her loan, and her final check was deposited and was not honored. All told, Betts paid NCA a total of $1240 in "fees" (plus $225 in verification fees) for the use of NCA's $300 over a period of 18 months.

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[1] NCA also charged a $5 verification fee to Mrs. Betts in each transaction.

None of Mrs. Betts' checks, in any of these transactions, were postdated.

The transactions between Mrs. Betts and NCA were governed by a standardized written agreement.[2] The agreement stated that "The consideration for these items and conditions is the agreement that National Cash Advance (NCA) will not present customer's check to a financial institution for payment until the date on the receipt."

The History of the Money Transmitters' Code

Resolution of this appeal involves the interplay between Florida's anti-usury loansharking statutes and Chapter 560 of the Florida Statutes, the "Money Transmitters' Code ("the Code"). In response to reports of widespread money laundering in the unregulated check cashing business, in 1993 Comptroller Gerald Lewis established a Money Transmitter Task Force to study the issue of check cashing and recommend a course of action. The Task force held seven public meetings in 1993 and 1994 and eventually issued a Final Report.[3] The Report recommended the enactment of a Money Transmitters' Code to regulate the check cashing business in the state of Florida. The legislature followed the

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[2] Numerous identical deferred presentment agreements between Betts and NCA are contained in the record at R. Dkt. 89, pp. 53, 57, 61, 64, and approximately every four pages thereafter through page 177.

[3] The Final Report of the Task Force is contained in Respondent's Appendix at Tab 2.

recommendation of the Task Force and chapter 560 was enacted in 1994. The Code as originally enacted in 1994 does not mention consumer lending or deferred presentment.

In 2001 the legislature revised the Code by passing Chapter 2001-119. Effective October 2001, the law revised the Code and created Part IV of Chapter 560, the "Deferred Presentment Act." The Deferred Presentment Act for the first time authorized licensed check cashers to engage in deferred presentment transactions, subject to certain limitations. Chapter 560, Part IV, Fla. Stat. (2003). For example, check cashers are required to establish a database in order to prevent a customer from engaging in a deferred presentment transaction if the customer already has a deferred presentment transaction pending, anywhere. § 560.4041, Fla. Stat. (2003). "Rollovers" are prohibited and defined as "the termination or extension of an existing deferred presentment agreement by the payment of any additional fee and the continued holding of the check (i. e. Type I rollovers) or the substitution of a new check drawn by the drawer pursuant to a new deferred presentment agreement (i. e. Type II rollovers)." § 560.404(18), Fla. Stat. (2003) (parentheticals supplied). Type III rollovers are prohibited by a requirement that once a customer completes a deferred presentment transaction, the customer must wait 24 hours before initiating another deferred presentment

transaction. § 560.404(19), Fla. Stat. (2003). This lawsuit and appeal concern only activity occurring prior to the effective date of the Deferred Presentment Act.

Litigation History

Betts brought this class action suit against NCA contending that deferred presentment transactions are illegal, usurious loans under Florida law. Betts' complaint stated the following statutory claims: Chapter 687, (Lending Practices Act); Chapter 516, (Consumer Finance Act); Chapter 501, Part II, (Deceptive and Unfair Trade Practices Act) and Chapter 772, (Civil Remedies For Criminal Practices Act). The trial court, compelled by the Fifth District's opinion in Betts v. Ace Cash Express, Inc., 827 So.2d 294 (Fla. 5th DCA 2002) holding that deferred presentment transactions were legal even prior to enactment of the Deferred Presentment Act, granted summary judgment to the Defendants.

On appeal a unanimous panel of the Fourth District disagreed with Ace and reversed the entry of summary judgment in favor of NCA. Betts v. McKenzie Check Advance of Florida, Inc., 879 So.2d 667 (Fla. 4th DCA 2004). The court agreed with the dissent of Judge Griffin in Ace and reasoned that the transactions between Betts and NCA plainly constituted loans under Florida law, and were not within the definition of check cashing under chapter 560. Id. at

674-75. The Fourth District also certified conflict with Ace, bringing about the instant appeal. Id. at 675.

National Cash Advance

NCA, a Tennessee limited liability company, was issued Registration No. 214-180/CC on November 7, 1995, and licensed as a Florida check casher pursuant to Chapter 560 of the Florida Statutes. (R. Dkt. 90A, Exhibit 1) The LLC was owned primarily by Defendants Steve A. McKenzie and Brenda McKenzie. (R. Dkt. 90A, Exhibit 2, pp. 15:11-19)[4] The Florida operation was part of a nationwide family of McKenzie companies engaged in virtually identical cash advance loan schemes across the country. (R. Dkt. 90A, Exhibit 2, pp. 17:15-18:21, 22:8-23:7, 24:12-25:16, 64:3-65:1) NCA and affiliated companies were formed, however, not for the purpose of cashing checks, but for the purpose of engaging in predatory lending practices. (R. Dkt. 90A, Exhibit 2, pp.12:19-13:19, 15:4-15, 19:9-16, 20:10-23, 21:19-22:7; Dkt. 90A, Exhibit 3, pp. 19:24-21:4) By 1997, the business had grown to 22 or more stores in Florida. The McKenzies conducted their payday loan business in Florida, Tennessee, Kentucky, Pennsylvania, Indiana, Illinois, Wisconsin and other states.

[4] Citations to deposition pages reflect the page number of the deposition, not the consecutive page number of the record.

SUMMARY OF ARGUMENT

The written agreements between Betts and NCA clearly show that the transactions between them were loans beyond the scope of check cashing authorized by the Money Transmitters' Code, Florida Statutes, Chapter 560, Part III. A true check cashing transaction does not include an agreement for the advance and repayment of money. The plain language and history of the Code demonstrate that it was never intended to authorize deferred presentment payday loans. Moreover, the check cashers, prior to the enactment of the Code, expressly agreed that adoption of the Code would only regulate true check cashing and not allow for deferred presentment payday loans.

Likewise, Rule 3C-560.803 did not authorize "deferred deposit" transactions. The Final Order in Wendy Betts and Donna Reuter v. Department of Banking and Finance and Advance America, Cash Advance Centers of Florida, Inc. D.O.A.H. Case No. 01-1445RX analyzed the scope of this Rule in light of the language of the Code and determined the Rule was valid, but did not authorize deferred presentment transactions or payday lending.

There is not even a colorable argument that would legitimize the rollover transactions that constituted the great bulk of Ms. Betts' business with NCA. Rollovers were specifically forbidden in the informal opinions of the Department

of Banking and Finance, the Attorney General's opinion, and the subsequent legislation that for the first time allowed certain deferred presentment transactions, the Deferred Presentment Act, Florida Statutes, Chapter 560, Part IV.

Applying Florida's longstanding jurisprudence on usury to NCA's payday lending scheme requires looking at the substance and not the form of the transactions. Calling the loan agreements between Betts and NCA a statutorily permitted "sale of currency" or the interest a "fee" will not prevent the law from finding and speaking the truth: these were usurious loans. The transactions between Betts and NCA fit squarely within the definition of usurious loans under Florida law.

The Fourth DCA's opinion in this case is better reasoned than the conflicting majority opinion of the Fifth DCA's in Ace. Betts disagrees with the Fourth District that Rule 3C-560.803 authorized deferred presentment, but if it in fact did so, then the Fourth District was correct in holding that the Department of Banking and Finance exceeded its authority in promulgating the Rule.

Finally, the "safe harbor" provision of Florida Statute Section 560.107 is not available to NCA for three reasons. First, there was no "rule, order or declaratory statement" authorizing payday loan agreements for NCA to

reasonably and in good faith rely upon. Second, NCA's conduct in attempting to pervert the Code into a cover for usurious lending cannot be considered good faith. Third, NCA cannot claim good faith reliance on a rule permitting receipt of postdated checks when the transactions at issue did not even involve postdated checks.

ARGUMENT

I. NATIONAL CASH ADVANCE'S DEFERRED PRESENTMENT TRANSACTIONS WERE NOT AUTHORIZED BY THE FLORIDA MONEY TRANSMITTERS' CODE.

The plain language of Part III of the Money Transmitters' Code only authorizes check cashing, not payday lending or deferred presentment transactions. Throughout NCA's brief NCA attempts to conflate check cashing with payday lending. NCA can only do this by ignoring the terms of its agreements with Mrs. Betts and its other customers, the plain language of the Money Transmitters' Code, and the patently obvious differences between routine check cashing transactions and deferred presentment payday loans.[5]

A. The express terms of the agreement between Betts and NCA demonstrate that the transactions were loans beyond the scope of authorized check cashing.

Notably, NCA never once refers to the actual agreement between Betts and NCA. This is not surprising, however, because the plain language of the agreement demonstrates that it is a loan agreement. NCA's standardized

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[5] NCA's argument begins with a puzzling assertion– that a routine check cashing transaction conducted prior to the enactment of the Code constituted a usurious loan. NCA cites no authority for this proposition. To the contrary, even prior to the enactment of the Money Transmitters' Code, providing cash in exchange for a check has been held to not be an extension of credit. See St. Pierre v. Winn Dixie Stores, Inc., 592 So.2d 1252 (Fla. 4th DCA 1992).

agreement states that, “The consideration for these items and conditions is the agreement that National Cash Advance (NCA) will not present customer’s check to a financial institution for payment until the date on the receipt.” By the express terms of NCA’s own agreement, the money Mrs. Betts paid to NCA was in exchange for NCA agreeing to forbear collecting the debt for two weeks.

The Fourth District recognized that a true check cashing transaction is something very different from the short term loan agreement entered into between Betts and NCA:

> There is no question that what takes place is something more than simple check cashing. In a deferred presentment transaction, the customer is advanced money in exchange for a check which the lender agrees not to immediately cash. In exchange for agreeing to defer presentment of the check, the lender exacts a fee. As Betts argues in this case, one might wonder why anyone would utilize the services of a "check casher" and pay for what he or she could otherwise obtain for free at a bank. Clearly, it is because the customer does not have the funds readily available to honor the check. Thus, there can be no question that what takes place is essentially an advance of money or a short-term loan.

McKenzie, 879 So.2d at 672.

This distinction between true check cashing and deferred presentment loans is extremely significant. As the Fourth District recognized, and as NCA does not dispute, deferred presentment transactions provide short term loans to individuals who do not have sufficient funds in their checking accounts to cash a

check. A deferred presentment customer is not seeking currency in exchange for a check; a deferred presentment customer is seeking an advance of funds.

What constitutes check cashing under Florida law is clearly defined by the Code. In sum, check cashing is defined as providing currency in exchange for a payment instrument. Both NCA and the Ace court find it noteworthy that there is nothing in chapter 560 requiring a check casher to deposit a customer's check or prohibiting a check casher from holding a check. This is true–the Code as originally enacted did not address lending money. Rather, the lending of money is addressed, as discussed in Section IV, infra, by Chapters 516 and 687.

B. The history of the Code further demonstrates that it was not intended to authorize deferred presentment transactions.

NCA and its supporting amici have adopted a veneer that NCA and its fellow payday lenders are simply good corporate citizens who at all times sought to act in conformance with the law.[6] The truth is not so benign. In reality, the

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[6] Moreover, the two amici also fail to fully disclose their true interest in this appeal. Although both amici profess an interest in "fairness" (FSCS Brief at 20; CFSA Brief at 1), both amici fail to disclose the personal stake their officers and directors have in this appeal. Fla. R. App. P. 9.370(b). Many of the officers and directors of the two organizations are affiliated with defendants, or are themselves defendants, in identical pending Florida lawsuits challenging the propriety of their payday lending deferred presentment transactions. FSCS President Paul Hauser and Treasurer Marshall Davis are associated with The Check Cashing Store, the defendant in Cardegna v. The Check Cashing Store,

(continued...)

payday lenders and their mouthpiece, the Florida Check Cashers Association[7] ("FCCA"), used the 1994 enactment of chapter 560 as a Trojan Horse to engage in usurious lending through deferred presentment transactions and rollovers that are well beyond the scope of true check cashing as authorized by the Code.

The Legislature in originally passing chapter 560 followed the recommendations contained in the Final Report of the Comptroller Gerald Lewis Money Transmitter Task Force. (Respondent's Appendix Tab 2) The report was compiled following seven meetings held by the Task Force between August 1993 and January 1994. (Respondent's Appendix, Tab 2 at 4) A review of the Task Force Report demonstrates that the Task Force was concerned with money laundering by the then-unregulated check cashing industry. The report is

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[6] (...continued)
Inc., No. CL00-5099AG (Fla. 15th Circuit Court). (Respondent's Appendix Tab 4) FSCS Regional Vice President Eric Norrington is affiliated with Ace America's Cash Express, affiliate to the defendant in Reuter v. Ace Cash Express, Inc., No. 50-2004CA008165 (Fla. 15th Circuit Court). Id. FSCS Secretary Jim Frauenberg is associated with Buckeye d/b/a CheckSmart, respondent in Cardegna v. Buckeye Check Cashing, Inc., No. SC02-2161. Id. CFSA board member and immediate past president Billy Webster is a defendant in Reuter v. Advance America, No. 2004-CA-008164 (Fla. 15th Circuit Court). (Respondent's Appendix Tab 5)

[7] The FCCA is now known as The Financial Service Centers of Florida, Inc.("FSCS"), and has filed an amicus brief in this appeal.

silent about the practice of payday lending through deferred presentment transactions.

When one examines the transcripts of the meetings of the Task Force it is readily apparent why the Task Force believed it unnecessary to address payday lending in their Final Report: Task Force member Joseph Doyle[8], representing the check cashing industry in his capacity as President of the FCCA, assured the Task Force on numerous occasions that legislation regulating check cashers would not open the door to payday lending. For example:

- The FCCA would report a member check casher to law enforcement if that check casher was engaging in usurious lending. Respondent's Appendix Tab 3, September 2, 1993 Transcript, 61:19-21.
- Doyle describes the procedure of effectuating payday loans through deferred presentment and goes on to state that the FCCA is opposed to the practice because it is usurious lending, which the FCCA would report to law enforcement. Id. at 168:1-22.
- Following testimony of Prof. Caskey of Swarthmore College, Doyle criticizes payday lending, concurs with Caskey's critical comments

[8] Doyle is also the current Chairman of amici FSCS, successor to the FCCA. (Respondent's Appendix Tab 4)

concerning the practice, and reiterates "The payday loans, we've talked about that in previous meetings. We're totally against that in Florida. Anything we can do to make it an illegal activity we're totally supportive of. . . . if they're going to make loans, they should get a license to do loans, period." Respondent's Appendix Tab 3, October 5, 1993 Transcript 226:10-18.

Having been assured by the check cashers' representative on the Task Force that regulation of check cashers would not open the door to payday loans, the Task Force proceeded to recommend the enactment of legislation that eventually became the Money Transmitters' Code. Not surprisingly, the resulting legislation did not address the subject of payday lending and focused instead on the licensing and regulation of check cashers. Nevertheless, the NCA and other check cashers promptly began to engage in payday lending on the flimsy basis that deferred presentment loans were permissible in accordance with the check cashing provisions of the Code.[9]

[9] Realizing that they were on, at best, shaky ground, the check cashers unsuccessfully sought legislation in 1996 that would have allowed for deferred presentment transactions subject to a "fee" in the amount of 15% of a check's face amount. Florida House of Representatives, 1996 HB 1059.

II. RULE 3C-560.803 DID NOT AUTHORIZE DEFERRED PRESENTMENT TRANSACTIONS UNDER CHAPTER 560, AND IF ONE CONCLUDES IT DID SO THEN THE RULE IS INVALID.

Despite the fact that none of Mrs. Betts' checks at issue in this case were postdated, NCA contends that the Rule authorizing check cashers to accept postdated checks authorized deferred presentment payday loans. NCA also relies on two letters authored by employees of the Department of Banking and Finance to support its contention that the Code somehow opened the door to deferred presentment payday lending in the state of Florida. Although NCA quotes liberally from the ALJ opinion and the two letters, a careful reading of each demonstrates that neither the opinion nor the letters provided a legitimate basis for NCA to engage in deferred presentment loans or rollovers.

A. The ALJ order specifically held that the Rule did not authorize check cashers to engage in deferred presentment transactions.

Although the ALJ concluded that the enactment of Rule 3C-560.803 was valid, the ALJ also concluded that the Rule *did not authorize deferred presentment transactions*: "The Department has no rule, order, or declaratory statement authorizing deferred deposit transactions or repeated, consecutive deferred presentment transactions by a registered check casher." ALJ Order ¶

22.[10] "The Rule does not establish the fees nor does it authorize 'rollover transactions' or 'payday loans.'" ALJ Order ¶ 81 (emphasis supplied). Instead, the ALJ Order simply concluded that a "check, regardless of whether it is postdated, falls within the definition of a 'payment instrument' as defined in Section 560.103(14)."

The ALJ order also sheds light on the original rule-making process. When the Rule was originally adopted, the Department cited Florida Statute 655.86 as the implementing law.[11] This statute provides that a bank is authorized to pay a postdated check even before the date on the check unless the maker of the check has provided prior notice to the office or branch of the financial institution that the check is postdated and should not be paid until the date on the check. ALJ Order ¶ 38. In other words, postdated checks are payable on demand. Recognizing that this was inadequate justification for adoption of the Rule, on the eve of the administrative hearing the Department added additional citations to the

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[10] The ALJ Order is at Tab 4 of Petitioners' Appendix.

[11] The DBF Rule Hearing where the Rule was adopted was chaired by Doug Johnson, author of the May 5, 1998 "Letter of Advice." The hearing transcript is 47 pages long. (Respondent's Appendix Tab 6) The full extent of discussion of Rule 3C-560.803 consisted of the following: "MR. JOHNSON: Section 803, moving right along, relates to postdated checks. MR. GIMBEL: I think you need that. I think that's very important. I'm glad to see the Department has finally taken that view. MR. JOHNSON: Section 804 . . ." Respondent's Appendix Tab 6, 46:9-14.

portions of the Code defining "payment instrument" to the law implemented section of the Rule. ALJ Order ¶ 39-40, 59-68.

Under this analysis, this Court need not conclude, as the Fourth District did, that the Rule authorized deferred presentment loans. Accordingly, this Court may conclude that deferred presentment transactions are loans outside the scope of chapter 560 without invalidating the Rule. Doing so would harmonize Chapters 560 and 687, and would recognize that the Code governs true check cashing, while the Usury Statute governs deferred presentment loans. Furthermore, if one concludes that the Rule authorized deferred presentment, then the Fourth District correctly concluded that the Rule exceeded the Department's authority under Chapter 560 and therefore is invalid. McKenzie, 879 So.2d at 673-74.

B. The informal letters from Department employees were not binding and in any event expressly stated that rollovers were not authorized by the Code.

NCA relies heavily on a letter from Department of Banking and Finance staff attorney Jeffrey Jones dated February 24, 1995, to support its contention

that deferred presentment transactions were permissible.[12] In a portion of the letter not quoted by NCA the letter stated:

> Finally, please be advised that this letter is not a rule, declaratory statement or final order. As such, the Department of Banking and Finance does not consider itself bound by this informal opinion. Should you desire a binding opinion of law, I would suggest that you request a declaratory statement as provided pursuant to Section 120.565, Florida Statutes, and Chapter 3-6, Florida Administrative Code.

(FSCF Appendix Tab A) Neither NCA, nor the FCCA, nor any licensed check casher, ever sought a declaratory statement as suggested. This is not surprising because there is simply nothing in chapter 560 that would support a conclusion that the enactment of chapter 560 authorized deferred presentment loans. There is simply no statutory authority supporting the enactment of a rule authorizing deferred presentment.

III. NCA DOES NOT DISPUTE THAT ROLLOVERS WERE NEVER AUTHORIZED.

Even if one assumes that licensed check cashers are permitted to delay the presentment of a check for two weeks, the vast majority of Betts' transactions with NCA were rollovers that clearly do not fall within the definition of a check cashing as set forth in the relevant statutes and regulations. Section 560.302(1)

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[12] A copy of the letter is contained in the Appendix to the amicus brief of The Financial Service Centers of Florida at Tab A.

provides that ?cashing means providing currency for payment instruments." § 560.302(1), Fla. Stat. (2001). Further, Florida Administrative Code Rule 3C-560.804(1) states that ?payment shall be made immediately in currency for every payment instrument received by a person engaging in the activities of a check casher." Fla. Admin. Code R. 3C-560.804(1) .

The overwhelming majority of ?fees" paid by Betts to NCA were in return for NCA's agreement to extend her obligation to pay the principal of her loan, not in exchange for NCA's providing currency in exchange for a check. Betts repeatedly rolled over her debt with NCA every two weeks. In her transactions through 1997 she did so by paying a "fee" and providing a new check. In return, Betts was granted an additional two weeks to repay the loan amount in cash, or through presentment of her new check at the end of the two-week period. On none of these occasions did NCA provide "currency" to Betts in exchange for her checks, as required by Chapter 560 and its attendant regulations. "When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way." Alsop v. Pierce, 19 So. 2d 799, 805-06 (Fla. 1944). Because no currency was provided to Betts in exchange for her check, these Type II rollovers did not fit the definition of check cashing under chapter 560.

On other occasions, Betts was permitted to "buy back" her check with cash equal to the face amount of the check. This act may fit the definition of a "payment instrument sale" under chapter 560, since NCA was selling Betts back her own check in exchange for cash, but does not fit within the Code's definition of check cashing. On these occasions Betts would immediately roll over her debt by writing a new check to NCA in exchange for cash minus a 10% "fee." The net result would be that Betts would leave the premises having paid a 10% "fee" for an additional two weeks to pay NCA the face amount of her check.

Regardless of the propriety of deferred presentment transactions, there is no dispute that rollover transactions have always been prohibited under Florida law. The clear pronouncements of both the Department of Banking and Finance and the Attorney General–relied on by NCA as justification for its loan activities–squarely prohibit licensed check cashers from extending, renewing, or continuing a deferred presentment transaction by accepting an additional fee in exchange for extending a customer's indebtedness for an additional time period. Op. Att'y Gen. Fla. 00-26 (2000); "Letter of Advice," Respondents' Appendix Tab 5.

NCA does not dispute that it engaged in numerous of these Type II rollovers with Mrs. Betts. Pet. Br. at 48 n. 25. NCA unconvincingly attempts to

justify its rollovers by contending that the Department's disapproval of rollovers was some sort of unanticipated surprise. This argument stretches credibility. Rollovers, as detailed above, clearly fall outside the definition of "check cashing" as set forth in the Code and regulations.

As for the Attorney General opinion concerning payday lending, it should be noted that the Attorney General concluded that the state usury laws do apply to payday loans accomplished via deferred presentment transactions. Op. Att'y Gen. Fla. 00-26 (2000). Moreover, the Attorney General further stated that "Nothing in Chapter 560, Florida Statutes, however, recognizes that such arrangements may be deferred from presentment in order to be extended, renewed, or continued in any manner with the imposition of additional fees." Id. The Attorney General, like the Department, thus concluded that rollovers were not authorized by the Code.

Further, the Attorney General's pronouncement that the usury laws apply to deferred presentment transactions does not square with the apparent conclusion of the Attorney General that a one-time, non-rollover deferred presentment transaction is permissible. Even though the opinion acknowledges that nothing in the text or legislative history of chapter 560 permits rollovers, nothing in the text or legislative history of chapter 560 suggests that deferred

presentment transactions are permissible, either. Accordingly, the Code should not be interpreted to have provided an exception to the usury laws. "Courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another." M.W. v. Davis, 756 So. 2d 90, 101 (Fla. 2000) quoting Forsyth v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992). Moreover, the legislature is presumed to be aware of existing statutes and case law when it enacts legislation. Wood v. Fraser, 677 So. 2d 15, 18 (Fla. 2d DCA 1996).

If one reasonably interprets both the Code and usury law there is no conflict between the two. The Code governs a transaction where a customer cashes a check by receiving currency in exchange for a payment instrument, and usury law governs an agreement where a customer agrees to receive an advance of money and promises to repay a greater amount at some point in the future. See Section IV, infra. As a result, the Money Transmitters' Code should not be presumed to have created an exception to state usury law.

The Attorney General's opinion offers no reasoning to support the conclusion that chapter 560, which says nothing of loans or deferred presentment, creates an exception to the usury laws which, according to the Attorney General, do apply to payday loans. If the Legislature wanted to

authorize check cashers to loan money through the deferred deposit mechanism, it certainly knew how to do so, as evidenced by the passage of Ch. 00-119, which specifically authorizes deferred presentment subject to certain limitations intended to prevent customers from ending up on a treadmill of debt as happened with Mrs. Betts.

For these reasons, as well as those set forth in Section IV, infra, Betts respectfully submits that to the extent that the pronouncements of the Attorney General and Department of Banking and Finance are interpreted to permit at least a one-time deferred presentment transaction that is not extended, continued, or renewed, these interpretations are flawed. It should be noted that these pronouncements are limited to an examination of whether anything in *chapter 560* prohibits deferred presentment, and not whether any provision would allow payday lending through an agreement to hold a borrower's check for an agreed period of time. This analysis reads Chapter 687 out of existence, and overlooks the reality that Betts and other payday loan customers would not even be doing business with payday lenders unless they needed to borrow money. If they

simply needed to cash checks they would be able to do so for free (at their own bank), or by paying far less than 10%.[13]

IV. THE DEFERRED PRESENTMENT TRANSACTIONS AT ISSUE CONSTITUTED USURIOUS LOANS.

For more than a century, Florida public policy has recognized the need to protect the public from usurious schemes. § 687.04, Fla. Stat. (2001). The primary purpose of Florida usury laws is **?**to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." See Dixon v. Sharp, 276 So.2d 817, 820 (Fla. 1973) quoting Chandler v. Kendrick, 146 So. 551, 552 (Fla. 1933). Through the enactment of Florida's usury laws, the legislature has clearly expressed its intention to prevent and unveil these usurious transactions that are masked by whatever form. See Gilbert v. Doris R. Corp., 111 So.2d 682, 684-85 (Fla. 3d DCA 1959). In the instant case, NCA has tried to conceal the usurious nature of

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[13] It is also important to note that the Attorney General opinion and the "Letter of Advice" assume that the customer's check will be deposited at the end of the two-week period. As is evidenced by Betts' transaction history, she almost never had sufficient funds in her account to cover their outstanding checks, thus she continually rolled over her loans by paying additional "fees" that eventually far exceeded the amount of the principal of her loans. In true check cashing transactions as contemplated by chapter 560 it is assumed that the checks will be deposited, thus preventing a scenario such as what happened to Mrs. Betts from ever occurring.

its money-lending transactions under the pretext of check cashing, notwithstanding the fact that its own name demonstrates that it is in the business of advancing, i. e., lending, money.

NCA's money-lending transactions clearly violate Florida usury laws. Specifically, its money-lending transactions violate Florida Statutes, Chapter 687, ?Florida's Lending Practices Act" and Chapter 516, ?Florida's Consumer Finance Act." Florida Statute section 516.02(1) provides that a lender must be licensed by the Department of Banking and Finance to make consumer loans, and section 516.02(2) provides that the lender may not charge an interest rate in excess of 18% per year. Loans made at a higher interest rate are not enforceable. Section 516.031(3) provides that any charges, including interest in excess of the combined total authorized by Chapter 516, constitute a violation of Chapter 687, which sets allowable rates of interest and defines usury:

> It shall be usury and unlawful for any person ... to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest.

§ 687.03(1), Fla. Stat. (2001).

Section 687.02 defines a ?usurious contract" as ?all contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest." § 687.02, Fla. Stat. (2001). Here, NCA's ?loan, advance of money, line of credit, or forbearance to enforce the collection" of Betts' checks for a two-week period, through its agreement to defer the presentment of Betts' checks, or to roll over the debt in the form of an extension or continuance, coupled with interest rates in excess of 270%, satisfy the definition of a usurious contract.

A. The transactions at issue fit squarely within the definition of usury.

Florida courts have defined the elements of usury through caselaw. See Dixon , 276 So. 2d at 819; Antonelli v. Newman, 537 So. 2d 1027, 1028 (Fla. 1st DCA 1988); Rollins v. Odom, 519 So. 2d 652, 657 (Fla. 1st DCA 1988). Four elements define a transaction as usurious: 1) a loan, expressed or implied; 2) an understanding between the parties that the money lent shall be returned; 3) interest charged at a rate greater than that allowed by law; and 4) corrupt intent to take more than the legal rate. Id.

A loan is defined as ?delivery by one party to and receipt by another party of a sum of money upon agreement, express or implied, to repay it with or without interest." Black's Law Dictionary, (6th Edition, 1990). NCA's payday loans, as evidenced by its deferred presentment agreements, as well as their rollovers accomplished through the extension of the original loan, fall within the definition of a loan. Betts' agreement to repay the borrowed money to NCA represents ?an understanding between the parties that the money lent shall be returned" and thus satisfies the second prong of the test. Dixon, 276 So. 2d at 819.

The third element, a charge of an interest rate greater than that allowed by law, has also been satisfied. Florida Statute section 516.01(4) defines ?interest" as ?the cost of obtaining a consumer finance loan and includes any profit or advantage of any kind whatsoever that a lender may charge, contract for, collect, receive or in anywise obtain." NCA loaned money to Betts at interest rates ranging upwards of 270% annually. NCA's agreements expressly provided that the consideration for the monies paid to NCA was NCA's agreement to permit its customers pay back a greater amount two weeks later. The maximum interest rate under Florida law is 18%. § 516.02(2), Fla. Stat. (2001); § 687.03(1), Fla.

Stat. (2001). The interest rates charged by NCA are over 15 times more than the statutory ceiling.

The third element of usury is also satisfied because the ?fees" charged by NCA constitute interest under Florida law. In determining whether the amount charged by a defendant is a fee or interest, a court should ?disregard the form of the agreement and consider the substance of the transaction." Antonelli, 537 So. 2d at 1029. The plain language of the agreements drafted by NCA states that "The consideration for these items and conditions is the agreement that National Cash Advance (NCA) will not present customer's check to a financial institution for payment until the date on the receipt." (R. Dkt. 89, p. 53) There is no need to draw any inference that the money paid to NCA was interest; NCA's own agreement plainly states that it was.

Finally, the fourth element of the usurious contract, ?corrupt intent," is also satisfied. ?The lender's testimony that he did not have an intent to charge and to receive interest in excess of the legal rate is not determinative of the question." Rollins, 519 So. 2d at 657. Rather, the element of corrupt intent is established when the ?lender consciously intends and does in fact make charges which result in usury." Id. at 658. When a lender such as NCA here has ?intentionally and purposely done that which amounts to or results in a contract for or the exaction

of usurious interest, an argument by the lender that it was not shown the lender intended to violate the usury statute is without merit." Id.

B. Courts must look at the substance of the transactions rather than the form employed by a usurious lender attempting to avoid the prohibition against usurious loans.

When one analyzes the substance of these transactions rather than the form, as is required under Florida law, it is clear that all of the transactions engaged in between Betts and NCA constituted usurious loans. Beacham v. Carr, 166 So. 456, 459 (Fla. 1936); Antonelli, 537 So. 2d at 1029; May v. United States Leasing Corp., 239 So. 2d 73, 75 (Fla. 4th DCA 1970); Kay v. Amendola, 129 So. 2d 170, 173-74 (Fla. 2d DCA 1961). This Court long ago recognized that usurious lenders will endeavor to employ any number of contrivances in order to give the appearance that their usurious loans are something else:

> The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions, the courts have been compelled to look beyond the form of the transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered.

Beacham, 166 So. at 459. NCA should not be permitted to characterize these transactions as a series of isolated, authorized check cashing transactions, when

in fact the transactions when viewed as a whole demonstrate that Betts paid enormous amounts of money–over four times the principal amount borrowed–for the privilege of the use NCA's $300 over a period of time.

1. Characterizing a usurious loan as a "sale" does not preclude application of the laws against usury.

Florida courts have routinely and repeatedly concluded that transactions disguised as ?sales" were in fact loans subject to the state usury laws. C.E.G. Griffin v. Kelly, 92 So. 2d 515, 518-19 (Fla. 1957) (reversing trial court's dismissal of usury claim structured as the sale of an option); Kay, 129 So. 2d at 173 (?our usury statutes show a clear legislative intent to prevent accomplishment of a usurious scheme by indirection, and the concealment of the needle of usury in a haystack of subterfuge will not avail to prevent its pricking the body of the law into action."); Brown v. Home Credit Co., 137 So. 2d 887, 891 (Fla. 2d DCA 1962) (finding that lender intended to disguise a usurious loan as a sale). And, as set forth previously in Section I, supra, the transactions at issue did not fit the statutory definition of check cashing. NCA's attempts to cloak payday loans as authorized sales of currency should be rejected.

2. The "fees" charged by NCA were interest.

Further, courts have demonstrated that they will not simply accept a lender's characterization of interest as a ?fee." Speier v. Monnah Park Block

Company, 84 So. 2d 697, 697-99 (Fla. 1955) (holding that mortgage brokers fee should be included as interest); Williamson v. Clark, 120 So. 2d 637, 638 (Fla. 2d DCA 1960) (affirming lower court finding that alleged ?inspection fee" was a ?mere cloak for the extraction of illegal interest"). Given the fact that NCA's own agreement acknowledges that the consideration for Betts' payments is NCA's agreement not to present Betts' check for payment for two weeks, the only reasonable conclusion is that the "fees" were actually interest. Moreover, with regard to the rollovers that constituted the vast majority of Mrs. Betts' transactions, the funds she paid NCA were not in exchange for currency, they were in exchange for an additional two weeks to pay back the principal of her loan.

3. Usurious lenders cannot avoid the prohibition against usury by mischaracterizing the transactions as being statutorily authorized.

Likewise, lenders are not permitted to cloak a usurious loan by portraying it as a statutorily authorized transaction. Quick Cash of Clearwater, Inc. v. State Department of Agricultural and Consumer Services., 605 So. 2d 898, 902 (Fla. 2d DCA 1992) (stating that Chapter 538 Florida Statutes did not exempt pawnbroker from usury laws); W.B. Dunn Company v. Merchantile Credit Corp., 275 So. 2d 311, 315-17 (Fla. 1st DCA 1973) (concluding that

transactions were usurious loans and that fee charged was interest despite defendant's argument that the transaction was permitted under the Retail Installment Sales Act). As set forth in Section I, supra, payday loan transactions were not authorized or even contemplated by chapter 560 prior to the enactment of the Deferred Presentment Act. And the rollover transactions clearly fall outside any plausible reading of activity authorized by chapter 560. See Section III, supra.

4. The transactions at issue must be viewed as a whole and not as a series of independent transactions.

Although NCA seeks to portray its transactions with Betts as a series of discrete, authorized transactions, this is not the case. First, as set forth in Section I, supra, the vast majority of transactions between Betts and NCA do not qualify as check cashing transactions authorized by Chapter 560. Second, lenders frequently try, to no avail, to disguise a usurious loan transaction by attempting to portray the usurious loan as a series of separate, legal transactions. See American Acceptance Corp. v. Schoenthaler, 391 F.2d 64, 70 (5th Cir. 1968) (finding that transaction allegedly consisting of sale of personal property and separate loan was in fact one usurious loan transaction); C.E.G. Griffin, 92 So. 2d at 518 (reversing judgment for lender who claimed that transaction consisted of separate stock option sale and loan).

A review of the history of Betts' course of dealing with NCA demonstrates that she returned to NCA about every two weeks, paid additional money, and left the store still owing NCA the principal amount of her loan. The majority of the transactions did not even consist of the exchange of currency for a payment instrument, instead Betts paid NCA a "fee," gave NCA a new check, and received no money in return. Clearly, the transactions when reviewed in their entirety demonstrate that the Betts paid hundreds of dollars over a period of months and years to NCA in exchange for the use of NCA's money, i.e., the transactions were simply usurious loans.

C. Courts analyzing the substance of deferred presentment transactions have concluded that they are loans.

Numerous courts have held that payday loan deferred presentment transactions are loans. These courts include the Indiana Supreme Court, Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572 (Ind. 2001)(holding that deferred presentment transactions are subject to state anti-loansharking law); the Seventh Circuit on numerous occasions, including a case involving the McKenzies' Illinois payday loan business, Hahn v. McKenzie Check Advance of Illinois, LLC, 202 F.3d 998 (7th Cir. 2000), as well as the cases Brown v. Payday Check Advance, Inc., 202 F.3d 987 (7th Cir. 2000), Smith v. Cash Store Manager, Inc., 195 F.3d 325 (7th Cir. 1999), and Smith v. Check-N-Go of

Illinois, Inc., 200 F.3d 511 (7th Cir. 1999); and several federal district courts, Jackson v. Check-N-Go of Illinois, Inc., 193 F.R.D. 544 (N.D. Ill. 2000), Turner v. E-Z Check Cashing of Cookeville, TN, Inc., 35 F.Supp.2d 1042 (M.D. Tenn. 1999), and Hamilton v. York, 987 F.Supp. 953 (E.D. Ky. 1997).

The court's opinion in Hamilton v. York is particularly instructive because the defendant in that case argued, like Petitioners here, that the deferred presentment transactions were check cashing transactions authorized by the state check cashing statute as well as the state Department of Financial Institutions. The district court rejected this contention:

> It is hard to imagine how charges for exchanging money today for more money at a later date could be classified as anything but interest on a loan when the transactions do not include a sale of property. Hamilton, 987 F.Supp. at 956 n.4.
>
> HLT also argues that the legislative intent behind KRS 368.100 encompasses short-term loans. The Court notes, however, that HLT cannot cite any substantive authority for this proposition. Additionally, if HLT's interpretation of KRS 368.100(2) was correct, "check cashing" companies would not have to stop with short-term loans they could make long-term loans as long as it was under the guise of cashing a check. Id. at 956.
>
> Although the Court reviewed the affidavit from Rick Jones, Acting General Counsel for the Department of Financial Institutions, it does not find Jones's affidavit to be persuasive. Since Jones is advising the check cashing companies in Kentucky to engage in short-term deferred loans, it is not surprising that he believes what he is saying is legal. However, his opinion is unpersuasive considering his

> constituents are the check cashing companies, and his opinion does not correlate to the true substance of KRS 368.100(2). Id. at n.5.
>
> Surely, the Kentucky legislature did not intend for businesses to be able to "get around" the usury statute and charge exorbitant interest rates by simply obtaining a "check cashing" license. However, if this is what the legislature wanted, it will have to clarify its intentions. Id. at n.7.

The facts at issue in this appeal are nearly identical to those of Hamilton v. York. This Court should follow the reasoning in Hamilton and the other courts to consider deferred presentment and hold, like those courts, that deferred presentment transactions are loans subject to the usury laws.

V. THE OPINION OF THE FOURTH DISTRICT IS BETTER REASONED THAN THE ACE OPINION AND SHOULD BE APPROVED.

The Fifth District Court of Appeal in Betts v. Ace Cash Express, 827 So.2d 294 (Fla. 5th DCA 2002) concluded that deferred presentment payday loans were legal under Florida's Money Transmitters' Code even prior to their express authorization in the Deferred Presentment Act of 2001. This conclusion was reached even though the text of the Code provides no indication that it was intended to create an exception to the state's usury laws, and the legislative history of the Code clearly demonstrates that it was not intended to authorize payday lending. In so doing the Fifth DCA made no reference to, or analysis of, nearly a century of Florida usury jurisprudence intended to protect needy

borrowers from the schemes and artifices utilized by predatory usurious lenders. Moreover, in concluding that the Deferred Presentment Act was a clarification of the existing Code, the court overlooked the fact that the overwhelming majority of transactions engaged in by the Plaintiffs in Ace were rollovers that would be illegal even under the present version of the Code.

In the key paragraph summarizing the majority's holding, the majority wrote:

> After considering the Department's advisory opinion solicited by the FCCA in advance of any deferred presentment transactions between Plaintiffs and Defendants, the subsequent authorization of the practice by the Florida Legislature, and the absence of any prohibition against the practice in the interim we disagree with the Plaintiff's characterization of the initial transaction as a loan.

Id. at 297. As set forth more fully below:

– The letter the majority characterizes as the "Department's advisory opinion" by its own terms is entitled to no deference and, in any event, a letter from the Department cannot overrule express prohibitions against usury;

– If the subsequent authorization by the Legislature clarified existing law in permitting deferred presentment transactions, it also clarified that the rollovers engaged in by Betts were always illegal; and

– The prohibition against the practice is found in Chapter 687 and decades of Florida caselaw, neither of which was addressed by the court.

Accordingly, this Court should not follow Ace, and instead should conclude that the Fourth District was correct in holding that, prior to their express authorization, deferred presentment transactions were loans subject to the state's prohibitions against usury.

A. The majority in Ace overlooked and misapprehended several points of law and fact in concluding that the payday loans in question were legal.

1. The majority failed to consider Florida's long-standing policy against usury which prohibits lenders from extracting usurious interest through the guise of a legitimate transaction.

In stating that in the interim between passage of the Money Transmitters' Code and passage of the Deferred Presentment Act there was "an absence of any prohibition against the practice" of deferred presentment payday loans, the Fifth DCA failed to take into account Chapter 687 and decades of usury caselaw. It is undisputed and well-settled that Florida has a strong public policy in favor of protecting needy borrowers from the depredations of usurious lenders. This Court has consistently held for decades that the primary purpose of Florida usury laws is **?**to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans."

See Dixon, 276 So. 2d at 817 quoting Chandler v. Kendrick, 146 So. 551, 552 (Fla. 1933).

Despite the allegations of the complaint, and the necessity of taking these allegations as true and rendering inferences in favor of the Plaintiffs, the Fifth DCA failed to consider or analyze the terms of the agreement between Plaintiffs and Ace in light of the elements of a usury claim. See Dixon , 276 So. 2d at 819; Antonelli v. Newman, 537 So. 2d 1027, 1028 (Fla. 1st DCA 1988); Rollins v. Odom, 519 So. 2d 652, 657 (Fla. 1st DCA 1988). The Ace dissent was correct: "These transactions are transparently extensions of credit." Ace, 827 So.2d at 299.

The Ace majority opinion, in neglecting to consider Chapter 687, also misapprehended the Appellants' argument by confining its statutory analysis to Chapter 560. Chapter 560 is silent on the issue of deferred presentment because, as is apparent from the history of Chapter 560, there was no reason to suspect that enactment of a check cashing code would open the door to payday loans.

To say that deferred presentment was permissible because Chapter 560 did not prohibit the practice is no different than saying a check casher could add a couple of zeros to a customer's check before cashing it. After all, there is nothing in Chapter 560 that prohibits a check casher from unilaterally converting

a $100 check into a $10,000 check. But doing so would constitute a forgery. Similarly, agreeing to lend money to a customer at usurious rates, or agreeing to hold a check for two weeks in exchange for a "fee," may not violate any provision of Chapter 560, but it does constitute usury under Chapter 687. Likewise, if the Legislature were to now amend Chapter 560 to permit registered check cashers to unilaterally alter the face amount of checks by a set percentage and then to negotiate that check, it would not legalize a forgery occurring before the amendment, unless the Legislature expressly stated that intent.

2. If the Deferred Presentment Act was a clarification of legislative intent then all of the rollovers were illegal then as they are now.

In its lone cite to a Florida case, the Ace court stated that it construed the Deferred Presentment Act (Ch. 01-119) as a clarification of Chapter 560. Ace, 894 So.2d at 297. If in fact the Legislature was clarifying Chapter 560, then the Legislature also clarified the status of rollovers: They were, and are, illegal. Although the Deferred Presentment Act expressly permitted deferred presentment transactions for the first time, as noted by the Fourth District, the Act also prohibited rollovers of the type engaged in by Betts. "'Rollover' means the termination or extension of an existing deferred presentment agreement by the payment of any additional fee and the continued holding of the check, or the

substitution of a new check drawn by the drawer pursuant to a new deferred presentment agreement." § 560.402(8), Fla. Stat. (2003) (emphasis added). Even the immediate repeat transactions engaged in by Betts, beginning in 1998 where she would "buy back" her check and immediately write a new check, are prohibited under the current Act, which requires a 24 hour "cooling off" period before entering into a new deferred presentment transaction. § 560.404(19), Fla. Stat. (2003). As recognized by the Fourth District below, the 2001 amendment "was not merely a modification of the prior act done for the purpose of clarifying that deferred presentments were, in fact, contemplated in the original version. Rather, it resulted in the addition of an entirely new and separate part of the Code addressing only deferred presentment and rollovers." McKenzie, 879 So.2d at 674.

Consistency requires that the Court give equal effect to all provisions of the Deferred Presentment Act. If the Act is read as providing clarification for the authorization of initial deferred presentment transactions, as held by the court in Ace, it also must be read as providing clarification that rollovers have never been legal.

3. The Court granted unwarranted weight to the informal, non-binding advisory letter from a staff attorney at the Department of Banking and Finance.

The Ace court characterized the letter from an assistant general counsel at the Department of Banking and Finance as an "opinion that was issued by the Department." Ace, 827 So.2d at 297. But the letter itself stated that it was not a binding opinion of the Department, and it urged the FCCA to follow the statutory procedure for obtaining a declaratory statement–advice that the check cashers ignored at their own peril.[14]

Even if one considers this letter as somehow an expression of Department policy, the fact remains that, as recognized by the Fourth District, the Department cannot arrogate unto itself the power to create an exception to Florida's prohibition against usury found in Chapter 687 and reinforced by a slew of court opinions over the years.

And if one concludes that the Department authorized deferred presentment, then one must also necessarily conclude that the Department far exceeded its authority. If the Legislature delegates certain authority to an administrative agency, the agency acts unconstitutionally if it attempts to "enlarge, modify, or contravene the grant of authority." Campus Communications, Inc. v. Department of Revenue, 473 So. 2d 1290, 1291 (Fla.

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[14] The letter also assumes that at the end of the deferral period, the check will be deposited. The vast majority of Betts' checks were never deposited.

1985). When an administrative rule conflicts with a statute, the statute controls. Nicholas v Wainwright, 152 So. 2d 458 (Fla. 1963). There is simply no statutory authority in Chapter 560 that would even remotely suggest that check cashers can engage in payday lending. Instead, there is express statutory authority outlawing usurious loans at the rates charged by payday lenders such as NCA as the criminal offense of loansharking. § 687.01-.071, Fla. Stat. (2001).

4. The Ace court erred in stating that the Plaintiffs did not allege that the Defendants failed to follow the procedural requirements for check cashing transactions.

The Ace majority further erroneously stated that "the Plaintiffs have not alleged that the ritual that the Attorney General would require was not followed." Ace, 827 So.2d at 298. In Ace, as here, the Plaintiffs specifically alleged that many of the numerous rollovers they engaged in consisted of the Plaintiffs writing a new, replacement check and paying a fee in cash. Ace, like NCA, made no payment of cash in exchange for the new check, as is required in a check cashing transaction. § 560.302(1), Fla. Stat. (2001); Fla. Admin. Code R. 3C-560.804(1). Check cashers should not be permitted to seek safe harbor in the check cashing Code when they have failed to follow the very requirements of the Code and its attendant regulations.

Furthermore, the Ace majority's conclusion that the "ritual" followed is largely irrelevant because "there is no practical difference" between a rollover and a consecutive transaction is, as far as that goes, correct. In analyzing a transaction alleged to be a usurious loan courts look past whatever contrived form a usurious lender may have used to conceal the usurious nature of the transaction, and instead look to the substance of the transaction. Beacham v. Carr, 166 So. 456 (Fla. 1936); C.E.G. Griffin v. Kelly, 92 So. 2d 515, 518-19 (Fla. 1957); Quick Cash of Clearwater, Inc. v. State Department of Agricultural and Consumer Services., 605 So. 2d 898 (Fla. 2d DCA 1992). But the majority's conclusion in Ace was *contra* to the body of usury caselaw; after disregarding the form utilized by Ace and looking to the substance of the deferred presentment and rollover transactions, the majority concluded that even the rollover transactions fell within the ambit of "check cashing."

This conclusion ignores the fact that rollovers, including "buy backs" followed immediately by a new transaction, invite a needy borrower to embark on a treadmill of debt that, in Mrs. Betts' case, led to her paying over $1000 to NCA over slightly more than a year's time for a loan of $300–without reducing the principal. Had the statutory procedures been followed and the checks actually cashed Mrs. Betts would have, at worst, been hit with an overdraft

charge as opposed to an 18 month series of usurious charges. In other words, had the transactions actually been check cashing, as opposed to deferred presentment, Betts would not have been a victim of NCA's predatory lending practices. Florida prohibits usury exactly because it exploits the financially vulnerable in a way that true "check cashing" cannot. Mrs. Betts is a classic example of the wisdom of, and need for, prohibitions against usury. NCA should not be permitted to evade these strong protections simply because it obtained a license to cash checks.

VI. NCA IS NOT ENTITLED TO PROTECTION UNDER THE CODE'S "SAFE HARBOR" PROVISION.

Finally, NCA attempts to shield itself under the protection of the "safe harbor" provision of the Code. § 560.107, Fla. Stat. (2001). NCA maintains it is entitled to safe harbor protection because it supposedly relied on rule 3C-560.803 permitting check cashers to accept postdated checks, *even though none of the checks involved in Betts' deferred presentment transactions were postdated.* NCA cannot claim good faith reliance on a rule that it did not even follow and that does not even apply to the transactions at issue.[15]

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[15] Further, as set forth in section II.A., supra, this Court may conclude that NCA's deferred presentment loans fall outside the scope of activity authorized by the Code without invalidating the Rule.

Moreover, in upholding the Rule, the ALJ expressly found that "The Department has no rule, order, or declaratory statement authorizing deferred deposit transactions or repeated, consecutive deferred presentment transactions by a registered check casher." ALJ Order ¶ 22.

Had NCA and the other check cashers actually been acting in good faith, they would have sought a declaratory statement, order, or rule that expressly authorized deferred presentment, as they were invited to do. Furthermore, as set forth in section I.B., supra, the check cashers' disingenuousness in using the Code as a Trojan Horse to open the loansharking floodgates belies any claim that NCA and its fellow payday-lending check cashers have acted in good faith.

CONCLUSION

The Fourth District below properly gave effect to both the Money Transmitters' Code and the Usury Statutes in concluding that deferred presentment transactions and rollovers were outside the scope of the Code and subject to the usury laws. Nothing in the pre-revision Code authorized deferred presentment transactions. Nor did Rule 3C-560.803 authorize such transactions, but if one concludes that the Rule did provide such authorization, then the Fourth District was correct that the Department exceeded its authority.

Accordingly, this Court should disapprove the Fifth District's opinion in Ace, approve and affirm the opinion below of the Fourth District, and remand this case for further proceedings.

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